No. 11948

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW L. JOHNSON and CHARLES W. GUNSTONE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' BRIEF

RYAN, ASKREN & MATHEWSON,
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APPELLANTS' BRIEF

I.

STATEMENT OF THE CASE

1. The Parties

This action was brought in the court below by Andrew L. Johnson and Charles W. Gunstone, a co-partnership, doing business under the name of Johnson & Gunstone, against the United States of America. The co-partnership will be referred to as the plaintiff or appellant and the United States of America as the defendant or appellee.

The action was brought under the provisions of Title IV. of Legislative Reorganization Act of 1946, Public Laws 601, 6 U.S.C. Congressional Service 778.

2. Statement of Facts and Issues of Case

The plaintiffs herein are owners of certain tidelands and tide flats located at Discovery Bay in the State of Washington which they have developed as a commercial clam farm. For many years prior to the bringing of this action, the plaintiffs had harvested and marketed the clams taken from said tide lands. On or about the first of December, 1945, the United States Navy anchored a number of large naval vessels in the waters of Discovery Bay adjacent to the tide lands of the plaintiffs and there was discharged into the Bay from the boats there moored, sewage, oil and other noxious matters which polluted the water and adjacent shore lands owned by the plaintiffs. Thereafter and as a result thereof, the State of Washington, on the 10th of December, 1945, issued an order prohibiting the taking of clams from the plaintiffs' lands for sale to the public, which order continued in force until after the termination of the normal clam digging season. As a result of the said pollution the plaintiffs sustained a loss as set forth in the complaint of approximately $46,000.00.

The plaintiffs brought the action in the court below under the provisions of Title IV. of the Legislative Reorganization Act of 1946, Public Law 601, 6 U.S.C. Congressional Service 778, said section being popularly known as Federal Tort Claims Act.

The defendant filed, among other pleadings, affidavits of the commanding officers of three of the ships which were moored in Discovery Bay during the period in question, the substance of which affidavits was

that due to the congestion in other ports at the cessation of hostilities, certain vessels were moored in Discovery Bay, where they remained awaiting the time they would be put into service transporting munitions back to this country from former combat areas (R. 7-31). The foregoing depositions were filed in support of the defendant's motion to dismiss this action for the reason and on the grounds that it was improperly brought, falling into one of the exceptions to the Act (R. 6). It was contended by the defendant that the court was without jurisdiction as being excluded by Section 421-J which reads as follows:

> "The provisions of this Act shall not apply to
> * * * * * * * * * *
> "J.—Any claim arising out of the combatant activities of the military or naval forces or Coast Guard during time of war."

The motion to dismiss was brought on before Honorable John A. Bowen, Judge of the District Court, and he held that this case fell within the exception quoted and dismissed the action (R. 32-35). From his dismissal the plaintiffs appeal to the Circuit Court.

II.

SPECIFICATION OF ERRORS

The court below was in error in granting the defendant's motion to dismiss the action.

III.

POINTS TO BE RELIED UPON

The two points upon which appellants will rely in attempting to show that this action was one properly brought before the Federal Court under the terms of the Federal Tort Claims Act, are:

(1) That the vessels causing the alleged pollution were not engaged in combatant activities so as to fall under one of the exemptions of the Federal Tort Claims Act.

(2) That the United States was not during the month of December, 1945, or during the year 1946, engaged in active hostilities and that the activity of its naval vessels in that period did not take place during time of war.

IV.

ARGUMENT

1. The Claim in Question Did Not Arise Out of the Combatant Activities of the Military or Naval Forces During Time of War.

Due to the fact that the so-called Federal Tort Claims Act is legislation of recent origin there are very few appellate court interpretations of its provisions. It is believed that this action is the first one which has come before the Circuit Court for a determination of the military and naval activities exemption in the statute.

It is suggested that a contemplation of the reason for the passage of the Act will throw illumination as to the intent of Congress in bringing it into being. Prior to the existence of this legislation it was necessary for a litigant to prevail upon his congressman to introduce a private bill for the redress of a wrong committed by agencies of the United States. With the expansion of the activities in which the Federal Government was interested, the volume of private bills with which Congress had to deal became so onerous

that the statute in question was passed so as to allow such claims to be handled by the courts. The intent of Congress in funneling suits of this character into Federal Courts was obviously to free itself so that the time previously consumed in their consideration could be devoted to the more natural objects of its attention.

There was exempted from the blanket operation of the Act certain specified types of litigation which for various reasons the Congress felt should be or were being cared for in another manner. Among the exceptions Congress excluded from the operation of the Act were claims arising out of the combatant activities of military or naval forces or Coast Guard during time of war.

It is a reasonable presumption that the Congress felt that damage caused during active warfare was of such unusual character that it should be judged and dealt with by a different standard than those actions of Government agencies which took place in circumstances more conducive to reasonable reflection. It is submitted, however, that it was the intent of Congress in passing this legislation to divest itself of as much of this type of litigation as possible.

If it were the intent of Congress to exclude from the operation of the Act any activity taking place during time of war, which was in any way connected with the belligerent activities, language could easily have been inserted in the statute which would have made that intention clear. It should be noted that Congress did not say that there should be exempted from

the operation of the Act any activity of the military forces during time of war or any activity connected with war, but they specifically declared that only those claims arising out of the *combatant* activities of the military forces during the time of war should be so excluded.

If the court were to exclude from the Act's operation everything, no matter how remote, which might be in any way connected with the operation of the armed forces, it is suggested that the obvious intent of Congress to relieve itself of these claims would be circumvented. Such an interpretation would not only be unrealistic but would eventually force the passage of clarifying legislation in order to accomplish the result they are obviously trying to reach by this law.

In the instant case we have a situation where the damage claimed was caused by the pollution of the water and adjacent tide lands of Discovery Bay in the State of Washington by United States naval vessels temporarily moored there. The situs of the action complained of was some three thousand miles distant from the most recent scene of any actual combat. This, aside from the fact that actual hostilities had ceased prior to the events set forth in the complaint. If damage caused in routine activity on ships moored three thousand miles from the scene of combat can be held to be the result of combat activities, then certainly damage caused by a United States motor vehicle on the streets of Seattle or New York City could equally be said to be the result of combatant activities, although such a conclusion is obviously untenable. To

carry the analogy still further, although in logical sequence, a wrong committed by an agent of the Government in a factory one thousand miles inland, which was fabricating some armaments eventually destined for a combat area could also be said to be excluded under such an interpretation. Such was not the intent of Congress when the combatant activities exemption was engrafted on this legislation.

The only case which counsel for the appellant have been able to find which passes upon this section of the Act is that of *Skeels v. United States*, 72 F. Supp. 372. In that case a fisherman was killed in the Gulf of Mexico by a metal object dropped from a United States Army plane which was there engaging in practice preparatory to being sent into the Pacific Theater of war. This accident happened while the United States was still actively engaged in hostilities with Japan. The same defense was asserted by the Government that was asserted in this case and the court held that although the agent of the Government causing the injury was actively practicing for combat duty, he was so far removed from the combat zone that it did not fall under this exemption, so as to be embraced by the language exempting injuries caused by combatant activities during time of war. The case has apparently not been appealed. It seems that an airplane engaged in simulated warfare, preparatory to actual combat comes more nearly falling into the category than does a naval ship dumping garbage into a bay, in which it is peacefully moored three thousand miles from the nearest scene of any combat.

2. The Activities of the Naval Vessels of the United States Which Are Complained of in the Plaintiffs' Complaint Did Not Take Place During Time of War.

Though it is felt the facts of this case indicate conclusively that the acts complained of did not arise out of combat, the argument that there was no war being waged at the time of the pollution of the plaintiffs' property is equally compelling.

It is undisputed that hostilities had ceased prior to December 1, 1945, the first date upon which the pollution alleged in the plaintiffs' complaint occurred. Japan surrendered on August 14, 1945, nearly four months prior thereto. The only basis upon which the judgment of dismissal of the lower court could be upheld would be by indulging in the legalism that war continued to exist for the purposes of interpretation of this legislation until a formal treaty of peace with all its ramifications had been worked out and executed. The formal termination of hostilities did not take place until the Presidential proclamation of December 12, 1946. It is repeated again that such an interpretation is not in conformity with the obvious intent of Congress in passing this act. Inasmuch as the government willingly waived its immunity to be sued, it would be illogical to hold that this waiver of immunity should be circuitously thwarted by such an unrealistic interpretation. When Congress made certain exceptions to the operation of this act, it was protecting the Treasury against the type of claim which could not be readily or properly investigated, or against the type which the government should have

the opportunity of deciding to what extent, if any, it should be paid. Such claims are those which arise either in the heat or in the environs of battle, but when a tort is committed by a governmental agency while the country is factually at peace, its character is not changed because the protocol of formal surrender has not yet been worked out. It was not the intent of Congress to exclude these claims from the courts on such a technicality.

To appellants' knowledge no decisions have yet come down interpreting the phrase "time of war" as used in this act. The courts have, however, decided when war terminated for purposes of resolving conflicts over pertinent clauses in contracts and other written instruments. In the case of *Samuels v. United Seamen's Service, Inc.*, 165 F.(2d) 409, the appellants appealed to the Circuit Court for relief from a lower court decision interpreting a clause in a lease whereby the tenure was to extend for six months after the cessation of hostilities. The court held that such language meant the cessation of actual warfare and not the formal signing of a peace proclamation. In the case of *Stinson v. New York Life Insurance Company*, U.S.C.A., D.C., decided March 15, 1948, the appellant sued as beneficiary in an action to collect on a life insurance policy. The policy restricted recovery if death occurred outside the home area while the insured is in the military or naval forces of any country engaged in war. The court held that for purposes of the policy the United States was not a country engaged in war on the date of the insured's death, even

though the war had not ended for public purposes by the signing of a treaty of peace or proclamation. The court held that in common usage the war ended with the surrender of Japan. The same result was reached by the Circuit Court in the case of *New York Life Insurance Company v. Durham*, decided in the Tenth Circuit on March 4, 1948, digested in 16 U.S. Law Week 2451.

There is a line of cases holding that terms such as "duration" and "end of war," etc., mean the cessation of actual hostilities, and that such words and phrases should be construed in the light of common understanding rather than in a technical sense. *United States v. Hicks*, 256 Fed. 707; *Kaiser v. Hopkins*, 6 Cal.(2d) 537, 58 P.(2d) 1278; *Scott v. Commissioner of Civil Service*, 272 Mass. 237, 172 N.E. 218; *La Fevre v. Healy*, 92 N.H. 162, 26 Atl.(2d) 681.

After the First World War the City of Seattle, Washington, passed a charter amendment giving preference in employment to those who had served "in time of war." An action was brought by an applicant for a civil service position who had served after hostilities had ceased but before a treaty of peace had been signed. In construing the phrase "time of war" the court used the following language:

> "The sole question in the case is what is meant by the words 'have served in time of war' in the charter amendment as applied to the World War. Appellant contends these words mean in point of time down until the ratification of the treaty of peace, while respondents say they do not apply to service commenced after the signing of the armistice. In this respect words in a given setting

and for a particular purpose may mean and often must be considered to mean a different thing from what they do in some other setting. What did the people of Seattle mean by this language they used in amending their charter?

"The words must be read in a sense which harmonizes with the subject matter and the general purpose and object of the amendment, consistent of course with the language itself. The words must be understood not as the words of the civil service commission, or the city council, or the mayor, or the city attorney, but as the words of the voters who adopted the amendment. They are to be understood in the common, popular way, and, in the absence of some strong and convincing reason to the contrary, not found here, they are not entitled to be considered in a technical sense inconsistent with their popular meaning."

State ex rel. Peter v. Listman, 157 Wash. 229, 288 Pac. 913.

Though there has been decisions, particularly after the First World War, which held that for the purpose of interpreting certain statutes the war ended only at the time of a formal declaration of peace, these pronouncements are neither pertinent nor of assistance in the instant case. We are not here concerned with the type of interpretation which may prematurely cause the demise of a war agency needing more time to bring its affairs to an orderly termination. The peculiar necessity which caused the insertion of the phrase "during time of war" in this statute was one which required that litigants should not be allowed

to take into court their claims for damages caused by act of battle. As soon as the active rather than the legalistic state of war had terminated, the need for the excepting of claims arising therein ceases.

CONCLUSION

In order to exclude a claim under the provisions of Section J of this act, it is necessary to prove that the claim arose (1) out of combatant activities, (2) in time of war. If either of the above is lacking, the exception is no bar and the case may properly be brought under the provisions of the act. It is submitted that at the time the torts complained of took place there was no state of war existing involving our country, and that the pollution most certainly was not caused by combatant activities.

In view of the foregoing, the appellants pray that the Order of Dismissal of the trial court be reversed, and that the action should be remanded and allowed to go to trial on its merits.

Respectfully submitted,

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Attorneys for Appellants.